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Post Office -- Discrimination in Postal Service Found Where Service Cut in Only One of Two Contiguous Communities, 5 U. Miami L. Rev. 324 (1951)
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evidences further extension of *Erie R.R. v. Tompkins*[22] into non-diversity cases. The court found it necessary to look to the substantive law of the state in order to determine a question preliminary to the ultimate federal question. Whether to follow an inferior state court decision, was resolved in the negative by departing from the lower state court decision because the court in the instant case was convinced the state supreme court would hold *contra*. This departure was prompted only by a "belief" that the federal courts have the freedom in non-diversity cases to differ with an inferior state court. This reasoning is the one used in diversity cases with unsettled state law,[23] though the court does not recognize the parallel in as many words.

POST OFFICE—DISCRIMINATION IN POSTAL SERVICE FOUND WHERE SERVICE CUT IN ONLY ONE OF TWO CONTIGUOUS COMMUNITIES

Pursuant to a directive of the Postmaster General ordering nationwide reduction of postal service, a postmaster of two contiguous communities cut deliveries to the business district of one, while not disturbing those in the other. Plaintiff, a businessman in the district whose deliveries were cut, sought a temporary and permanent restraining order to compel the postmaster to continue the same mail delivery service to plaintiff as plaintiff had received prior to the issuance of the Postmaster General's directive. *Held*, injunction issuing, that there must be no discrimination in postal service between business districts of the two communities served by defendant's post office. *Fite v. Payne*, 91 F. Supp. 896 (N.D. Tex. 1950).

The power of Congress to establish the postal system[1] includes the regulation of the entire postal system,[2] all powers necessary to make the grant effective,[3] and all measures necessary to secure the safe, speedy and prompt delivery and transmission of the mails.[4] Since the Constitution does not guarantee unrestricted use of the mails,[5] the mere establishment of the postal system does not automatically confer rights upon individuals to receive its services free from either statutory restraints[6] or discrimination.[7]

Congress delegates to the Postmaster General power to make regula-

22. 304 U.S. 64 (1937).

23. Cooper v. American Airlines, Inc., *supra* note 6; MacGregor v. State Mut. Life Assur. Co., *supra* note 1; Huss v. Prudential Ins. Co. of America, *supra* note 7; West v. American Tel. & Tel. Co., *supra* note 6.

1. U. S. CONST. Art. I, § 8, cl. 7.
2. *Ex parte* Jackson, 96 U.S. 727 (1877).
3. *Ex parte* Rapier, 143 U.S. 110 (1892).
4. United States v. Musgrave, 160 Fed. 700 (E.D. Ark. 1908).
5. Warren v. United States, 183 Fed. 718 (8th Cir. 1910).
6. *Cf.* Acret v. Harwood, 41 F. Supp. 492 (S.D. Cal. 1941).
7. Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913)(Congress was permitted, in furtherance of the dissemination of knowledge, to so legislate as to favor publications, though this intrinsically discriminated against the general public).

tions which are controlling, have the force of law, and are judicially noticed.[8] The Postmaster General acts through local postmasters.[9] Discretionary authority of the Postmaster General may be exercised over such matters as establishment[10] and discontinuance[11] of post offices and branch post offices,[12] establishment of mail boxes,[13] carriage of mail on post roads,[14] employment of letter carriers for free mail delivery in every incorporated area containing over 10,000 people,[15] and the establishment of experimental delivery in certain places.[16] The number of daily deliveries in all places is fixed by the Post Office Department, and may not be changed except by authority of the First Assistant Postmaster General.[17]

While it is the duty of the Post Office Department to deliver mail, insofar as possible, to the individual for whom it is intended,[18] where the decision of questions of fact is committed by Congress to the judgment and discretion of a department head, his decision thereon is conclusive.[19] Even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it in injunction proceedings.[20] A department head is not liable in mandamus[21] or injunction[22] for an error of judgment. In faithfully and impartially carrying out the Postmaster General's orders to deliver the mails, a local postmaster is not generally interfered with in his judgment and discretion, unless failure to deliver impairs a substantial right.[23] However, it has been held that the Postmaster General was subject to mandamus

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8. Wayman v. Southard, 10 Wheat. 1 (U.S. 1825); Caha v. United States, 152 U.S. 211, 220 (1894); *Ex parte* Willman, 277 Fed. 819 (S.D. Ohio 1921).
9. Fite v. Payne, 91 F. Supp. 21 (N.D. Tex. 1950).
10. 42 STAT. 24 (1921), 39 U.S.C. § 1 (1946).
11. 42 STAT. 24 (1921), 39 U.S.C. § 2 (1946); *cf.* Ware v. United States, 4 Wall. 617 (U.S. 1867).
12. REV. STAT. § 3871 (1875), 39 U.S.C. § 158 (1946).
13. REV. STAT. § 3868 (1875), 39 U.S.C. § 155 (1946).
14. REV. STAT. § 3965 (1875), 39 U.S.C. § 483 (1946).
15. 24 STAT. 355 (1887), 39 U.S.C. § 151 (1946).
16. 37 STAT. 559 (1912), 39 U.S.C. § 153 (1946).
17. 39 CODE FED. REGS. § 50.2 (1938).
18. Fite v. Payne, *supra* note 9.
19. Bates & Guild Co. v. Payne, 194 U.S. 106 (1904) (court refused to review Postmaster General's order declaring plaintiff's publication not to be a periodical); Review of Reviews Co. v. Hitchcock, 192 Fed. 359 (S.D.N.Y. 1911) (enforcement of Post Office Department economy measure requiring certain class of periodicals to be shipped by slower freight method than others); Miller v. United States, 233 U.S. 1 (1914) (in action by carrier, court refused to review Postmaster General's discontinuance of contract to carry mail over designated Alaskan route); *cf.* Neil, Moore & Co. v. Ohio, 3 How. 720 (U.S. 1845) (". . . it rests altogether in the discretion of the Postmaster General . . . to determine at what hours the mail shall leave particular places and arrive at others; and to determine whether it shall leave the same place only once a day or more frequently. Upon this point his decision is absolute . . . and cannot be controlled by a State or by the courts. . . . The Postmaster General is, upon this subject, the proper and only judge of what the public interest and convenience requires. . . .").
20. See note 19 *supra*.
21. Kendall v. Stokes, 3 How. 87 (U.S. 1845).
22. Gaines v. Thompson, 7 Wall. 347 (U.S. 1868).
23. Griffith v. W. S. Wick Grocery Co., 272 Fed. 246 (6th Cir. 1921).

in the performance of a purely ministerial duty,[24] and to a writ of injunction where his action was not authorized by the statutes under which he assumed to act.[25]

In the instant case, the court did not mention the First Assistant Postmaster General's exclusive authority to order changes in the number of daily mail deliveries. No authority was cited by the court, nor has any been found, for the proposition that continued receipt of mail at fixed intervals is such a substantial right as will justify the court in interfering with the discretionary authority of the Postmaster General and local postmasters. While analogous cases have been decided on the basis of the defendant's exceeding his statutory authority, such was not the situation here. Prior to the instant case, no court had undertaken to enjoin a postmaster from carrying out the orders of his superior, on the grounds of discriminatoin. While a local postmaster may not be afforded so wide a latitude in exercising discretionary authority as the Postmaster General, the court, in deciding the instant case, would appear to have acted without substantial authority.

SALES—EXECUTED CONTRACTS—SALE OF FRUIT ON TREES

Plaintiff, cirtus grower, contracted with defendants, fruit packers, for the sale of unpicked grapefruit, the probable harvesting date being set more than two months from the date of contract. Defendants ring-picked the orchard five times and then refused to clean the trees, as provided in the contract, charging that the fruit had not developed suitably for their purposes due to the plaintiff's breach of an implied obligation to care for and water the orchard. Plaintiff sought to recover the difference between the contract price and that obtained by a sale of the remaining fruit. The trial court entered an instructed verdict for the plaintiff which was reversed and remanded by the Court of Civil Appeals[1] on the grounds of error in refusing to let the defense of implied obligations go to the jury. *Held*, affirming the instructed verdict for the plaintiff, the contract was one of sale and passed immediate title to the defendants, thus relieving the plaintiff from further duty. *Moffitt v. Hieby*, 229 S.W.2d 1005 (Tex. 1950).

A contract is executed when nothing remains to be done by either party.[2] In the case of a contract for the sale of personal property the question of execution is one of fact,[3] the answer to which is dependent upon

24. Kendall v. United States, 12 Pet. 524 (U.S. 1838).
25. American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).

1. Moffit v. Hieby, 225 S.W.2d 411 (Tex. Civ. App. 1949).
2. Hatch v. Standard Oil Co., 100 U.S. 124 (1879); Farrington v. Tennessee, 95 U.S. 679 (1877); E. C. Artman Lumber Co. v. Bogard, 191 Ky. 392, 230 S.W. 953 (1921).
3. N. P. Sloan Co. v. Barham, 138 Ark. 350, 211 S.W. 381 (1919); First National Bank of Ottumwa v. Reno, 73 Iowa 145, 34 N.W. 796 (1887); Johnson v. Tabor, 101 Miss. 78, 57 So. 365 (1912); Sanford v. Nickerson, 91 N.H. 71, 13 A.2d 723 (1940).